IN THE HIGH COURT OF LESOTHO

CIV/APN/311/2012

In the matter between:-

PRIVATE SECTOR FOUNDATION OF LESOTHO	**1ST APPLICANT**
AND	
THABO QHESI	**1ST RESPONDENT**
OSMAN MOOSA	**2ND RESPONDENT**
STANDARD LESOTHO BANK	**3RD RESPONDENT**
KUTLOANO SELLO	**4TH RESPONDENT**
GENERAL SENTLE	**5TH RESPONDENT**
JERRY FOULO	**6TH RESPONDENT**
MONTS'UOE LETHOBA	**7TH RESPONDENT**
MOLOI SETHATHI	**8TH RESPONDENT**
TS'OLO LEBITSA	**9TH RESPONDENT**
'MATJAKA MOLEFI	**10TH RESPONDENT**
LIMO MATHOLO	**11TH RESPONDENT**

CORAM : Hon. Mahase J.
Date hearing : 23RD July 2012
Date of ruling : 1st August, 2012

SUMMARY

Civil Procedure – Application proceedings – urgent, exparte application – Final effect of an order obtained exparte – whether such rule nisi to be discharged if orders have final effect.

ANNOTATIONS
CITED CASES:-

- **United Watch and Diamond Co. (PTY) Ltd. and Others v. Disa Hotel and Another 1972 (4) S.A. 409 (c)**

- **Ntai and Others v. Vereeniging Town Council and Another 1953 (4) S.A. 579 (A)**

- **Central Bank of Lesotho v. Phoofolo**
- **Lesotho Revenue Authority and Others v. Olympic Offsales LAC (2005-2006) 535 at 541.**

- **Mall (Cape) (TPY) Ltd. v. Merino Ko-operasic BPK 1957 (2) S.A. 347 (c)**

- **Plascon-Evans Paints v. Van Riebeck (PTY) Ltd. 1984 (3) S.A. 623 (A) 634-635**

- **Mbagamthi v. sesing Mbagamthi LAC (2005-2006) 295 at 301 B-G para (8)**

- **Mabusetsa Makharilele and Others v. National Executive Committee of the Lesotho Congress for Democracy and Others CIV/APN/82/2001**

- **Wing on Garment (PTY) v. Lesotho National Development Corporation and Another, LAC (1995-1999) page 752**

- **Kabi Monnanyane v. SOS Children' Home and Others C of A (CIV) No. 36 of 2005. LAC (2005-2006) 416**

- **N.U.L. Students Union v. N.U.L. and Others 1993 - 1994 LLR-LLB p. 87**

- **Attorney General and Others v. Morapeli Mataung C. of A. (CIV) No. 18/2001**

- **'Malimakatso Ramahata v. Thabiso Ramahata LLR 1995 – 1996.**

- **Matseliso Thai v. Standard Bank PLC and Another C. of A. (CIV) No. 32 of 1991**

- **Open Bible Ministries and Another v. Ralitsie Nkoane and Anther 1991 – 1992 LLR and LB 112**

- **Nkhabu v. Ministry of Interior and Another C. of A (CIV) No. 1 of 1993**

- **Matime and Others v. Moruthane and Others 1985 – 1989 LAC 198 at 200**

- **Masopha v. 'Mota 1985 – 1989 LAC p. 58**

- **Basotho Congress Party and Others v. Director of Elections and Others 1999 – 2000 LLR LB 512 at 531**

- **Setlogelo v. Setlogelo 1914 AD. 221**

- **Seth Lieta v. Semakale Lieta, C. of A (CIV) No. 5 of 1987**

- **Lesotho District of the United Church v. Rev. Moyeye and Others C. of A. (CIV) No. 12 of 2006; LAC (2007-2008)**

- **Lesotho Evangelical Church v. Nyabela 1980 LLR 446**

- **Strong Thabo Makenete v. Major General Metsing Lekhanya and Others 1991 -1992 LLR and LB 126**

STATUTES:-

- **High Court Rules No. 9 of 1980**

BOOKS:

- **Herbstein and van Winsen - The Civil Practice in the Superior Courts of South Africa, 3rd Edition pages 59 - 60**

JUDGMENT

[1] The applicant approached this Court on the 15th June 2012 on urgent ex parte basis seeking prayers which are set down in the notice motion. The application was granted save for prayer 4.

[2] Prayers 1 and 2 were to operate with immediate effect as interim court orders and temporary interdict pending finalization of this application.

[3] However, it has since transpired that, in actual effect, the net effect of the said court orders is that of a final effect. This therefore means that, the applicants have obtained court orders with a final effect without the respondents having been afforded a hearing even though they are directly affected by such court orders by virtue of them having been members of the applicant prior to the 24th May and during the 15th June, 2012. Refer to paragraph 2.6 of the founding affidavit.

[4] It is a matter of common cause that, being members of the applicant at all material times, the respondents have a direct and substantial interest in the affairs of the applicant.

[5] The application is being opposed by the respondents except the third respondent on whose behalf no opposing papers have been filed.

[6] It is apposite to indicate that though ex facie the record, prayer 4 has not been granted, the net effect of prayer 2 is that it confers to the applicant the exercise of the same right, and obligations over the executive committee headed by Mr,

Mosothoane; the incoming chairperson of the applicants have not filed any replying affidavit.

[7] The respondents deny that the present applicant is the Private Sector Foundation of Lesotho (PSFL) as it purports to be in the papers herein filed. It is alleged that in fact, the applicant is a faction of the said PSFL; which faction has unlawfully and contrary to the constitution of the real or the authentic PSFL. Ousted its chairperson and all its members of the executive Committee.

[8] Respondents accordingly argue that the meeting of the 24th May 2012, pursuant to which the applicant purportedly installed themselves as the executive committee of the applicant is unlawful and that consequently the resolutions arrived thereat are void and of no force and effect - refer to respondents heads of arguments.

[9] The respondents deny that the meeting of the 24th May 2012 was called in accordance with the constitutional provisions of the PSLF. Reliance in support of this argument is based on the provisions of clause 20.4 which empowers and imposes a duty upon the executive committee to call and or convene an extraordinary and special meeting of the PSFL/of the association.

[10] The respondents deny that the meeting of the 24th May instant, was called or convened by the erstwhile President of the PSFL, second respondent herein. In fact, and to be precise, the legality of the said meeting as well as the purported removal of the entire executive committee and of the second respondent from the presidency of the PSFL is challenged by the respondents; who allege that, in purporting to convene that meeting, the faction members of the PSFL/the applicants have flouted the provisions of clause 22.1 of the proper PSFL, among others.

[11] It has been argued on behalf of the respondents that where the members' petition for a special meeting of the association and the office bearers refuse to call such a meeting and the requisition is otherwise proper, the remedy is for the signatories of the petition to compel, by order of court, the calling of such a meeting, not for them to call the meeting themselves. Refer, paragraph 2.1.5 up to 3 of the respondents' heads of argument.

[12] It has been argued further on behalf of the respondents that, alternatively, a meeting of the PSFL could be called or convened by the Board of the PSFL association.

[13] Adv. M.E. Teele K.C. argued further in this regard that apart from having acted contrary to the provisions of the PSFL

constitution referred to above, the alleged members of that association who purported to call and remove the second respondent from the presidency/chairmanship of PSFL have acted contrary to and have done what is forbidden in the case of Qhobela and have thereby taken the law in their own hands. This they did in the absence of certain members of the PSFL from that meeting including the second respondent and also without having informed all the members of the PSFL that amongst the agenda items to be discussed and deliberated upon was the removal from office of the whole of the executive committee of the PSFL as well its chairperson, the second respondent. The said item is not included in annexure "B", which appears at page 21 of the record of proceedings.

[14] It is argued further on behalf of the respondents that apart from the fact that the meeting of the 24th May instant had not been convened lawfully or properly, there is no indication that any notice (proper or not) was ever given to the members of this association through which they were also informed of the contemplated removal from office of the entire executive committee and that of the president or chairperson (2nd respondent)

[15] The argument is therefore that, in the absence of such notice and for other reasons alluded to above, the conduct of the newly installed executive committee members vitiates any

resolution on removal. Refer to paragraph 2.1.6 and 2.1.7 (incorrectly written 2.1.2) of the respondents' heads of argument and authorities therein cited.

[16] It has since been observed by this Court that the executive committee which was allegedly removed from office has not been cited as a party in this application. Only three members of the former PSFL have been singled out and described by the deponent to the founding affidavit. There is no description of the respondents members five up to eleven; as such their role and interest herein is not clear.

[17] Be that as it may, counsel for the respondents has not joined issue on the none joinder of the said outsted executive committee of the PSFL.

[18] A further challenge of the appointment of the deponent to the founding affidavit and her colleaques to the executive committee of the applicant, is that even if the said special meeting had lawfully removed the second respondent as well as the entire executive committee from office, it is the Board of PSFL which has powers to appoint the chairperson and his vice. The provisions of clause 6.5 of the PSFL constitution, annexure E, page 30 of the paginated record addresses and guides the association as to the appointment of certain office

bearers; in particular, the position of the chairman or the vice chairman in case such post falls vacant.

[19] There is nowhere, where the deponent to the applicant's founding affidavit says that, such a procedure was invoked by the members who had convened the special meeting of the 24th May 2012, in which meeting the entire executive committee as well as the chairperson of the PSFL were removed from office.

[20] In fact, the deponent and those who had convened and attended the said special meeting of the 24th May have flouted the provisions of this important clause as if this clause does not at all exist. That probably explains why she describes herself as being the chairperson of the applicant etc.

[21] According to the provisions of this clause, a chairman or vice chairman should have been elected at an extra ordinary general meeting which should have been convened within 90 days after the appointment by the Board of an interim chairman or an interim vice chairman.

[22] In fact, there is no semblance of compliance with the clear provisions of this clause of the applicant's constitution by those who had convened and attended that meeting of the 24th May 2012.

[23] The clear provisions of this particular clause do not and cannot be interpreted to allow acts of unlawfulness and self help among members of PSFL. This is so, whether or not the reasons advanced by the deponent to the founding affidavit, are in existence and correct. The provisions of this constitution, which is a contract between or among members of the PSFL, should always be used as a guide by members in carrying out their various activities in that association.

[24] This now brings me to deal with the ex parte application itself. The absence of any justifiable reason(s) explaining why the applicants had to approach the court on urgent exparte basis, without having notified the respondents of same is compounded by the flouting of the clear constitutional provisions by the applicant as well as by the final nature and or final effect of the rule nisi dated the 15th May 2012 granted to applicants without them having been notified about the application. This is an abuse of the court process, moreso because even though the notice of motion is couched in such a way as to portray that the prayers sought would operate as temporary interdict relief pending the finalization of this application, this is not so.

[25] Clearly, the effect of the said interim court order is a final one hence why the alleged new executive committee and a "new chairperson" are now running the affairs of the PSFL. This is

a matter of common cause. No justifiable reasons in law have been advanced on behalf of the applicant explaining why it had to approach this court on urgent ex parte basis on the disguised temporary interim relief.

[26] The applicant has nowhere in her founding affidavit explained how, and when the second respondent and the entire executive committee which was in existence before the convening of the 24th May 2012 defrauded the applicant. It has already been alluded above that there is not notice issued to all members of the PSFL notifying them of the intended meeting i.e. the general meeting as appears in annexure "B". This Court is not even told if the provisions of that particular clause 4.5 were complied with to the letter by the deponent.

[27] The Court has not been referred to any clause in the PSFL constitution which provides for the use or adoption of a petition as against a notice in calling for or in convening a general meeting; neither is it argued that members of this association were notified of that meeting and the agenda relating to the removal of the entire executive committee members and the chairperson within the stipulated period(s) and as indicated in the provisions of clause 4.5 of the constitution in question.

[28] This Court further notes, that in the said petition, the venue for the said meeting is indicated as being Maseru Sun but in complete contrast, the minutes as appears in annexure D at page 27 of the record, indicate that the venue for the meeting of that day, the 24th May 2012 was Metcash complex. There is nothing on the founding papers indicating that a change of venue was, prior to the meeting being held, ever communicated to all the PSFL members. This is a matter of common cause.

[29] The applicants' case has been summarized in the introduction in its heads of argument. However, it becomes clearly notable that the deponent to the founding affidavit has now, in the introduction raised and or that it canvasses a fresh or new case from that raised in its notice of motion. The deponent to this affidavit refers to protection of its property from being taken away by the first and second respondents. This it raises without explaining why it had to come to court on urgent ex parte basis. Mindful of the fact that at the time, both the first and the second respondents had not yet been lawfully removed from office, it is pertinent for the deponent to have notified them of her intention to approach the court.

[30] The next logical question to ask and or which has to be answered, is if indeed it is the first and second respondents who had taken away such property thereby dispossessing

PSFL of it why then did applicant/deponent to the founding affidavit have to remove all of the PSFL former executive committee members from office? There is no explanation why that is so.

[31] There is no supporting affidavit filed by any of the staff members referred to in the certificate of urgency, to confirm that indeed the operations of the PSFL had been paralysed as is alleged by the deponent.

[32] Furthermore, it is stated as one of the reasons which prompted the applicant to come to court on urgent ex parte basis, that there will be bloodshed and fighting. There is no explanation nor the basis for this proposition. This Court has not been told who would fight who and cause bloodshed. Why would, the said respondents, who had convened a press conference as is stated in that certificate of urgency to inform some of the PSFL members, be considered to have been likely to fight and cause bloodshed.

[33] This Court does not find the justification nor is it persuaded that any of the respondents had intended to fight anybody. The contrary is correct hence why the first respondent willingly and without force handed over the property herein to applicant's lawyer. At what stage could it be assumed that first and second respondent would fight anybody?

[34] The issue of non-joinder has been dealt with above. If indeed some members of the executive committee of the PSFL, who are interested in the affairs of the PSFL are not joined as applicant concedes, then this is improper. There is no doubt that by virtue of their membership in the PSFL they have a substantial legal interest in its affairs. Otherwise why would anybody join a voluntary association in which one has no interest? The fact that the applicant later had the said members belatedly joined in this application is a clear indication that it concedes that they have an interest.

[35] It has been submitted on behalf of the applicant that it is entitled to protect its own rights. What the applicant does not say is whether it possess that property on its own and aside or independently from its members, including the executive committee members. Put differently, does the PSFL as an entity exist in total isolation from its members? I think not. In the premises, the executive committee of the PSFL should all have been joined herein this application. Their non-joinder is therefore fatal to this application.

[36] It has been argued on behalf of the applicant that only the second respondent had refused to call or to convene the special meeting because he knew that the agenda in that meeting would be his fraud conviction.

[37] It was argued further that all people herein cited with the second respondent are happy with the decision of the meeting of the 24th May 2012. However this is not supported by any of them.

[38] Be that as it may, the most pertinent question, namely the fact that applicants should have approached a court of law to compel the second respondent to convene a special meeting, still remains unanswered.

[39] The applicant has not explained why it resorted to self help thereby taking the law into its own hands by removing the second respondent as well as the entire executive committee of the applicant from office and in total disregard of its own constitutional provisions.

[40] In the case of Marumo & Others, cited in support of the applicant case, the applicants resorted to court when the N.E.C of the party to which they were members had refused to convene a special general conference. This is the correct way to handle issues arising as a result of the internecine conflict within a voluntary association. This is so, not unless if by clear constitutional provisions, such a procedural step is expressly forbidden. The rational behind this is so as to avoid a situation where members of an association would fight and or resort to acts of unlawfulness.

[41] As has been pointed out above, the issue whether or not even the executive members removed from office together with the second respondent have also committed fraud, remains unanswered. This court has not been referred to any specific act or actions allegedly committed by those other executive committee members which have justified the removal of the entire executive committee; from office besides the second respondent.

[42] The issue of spoliation raised on behalf of the applicant is not born out by any evidence. As I have indicated above, there is no supporting affidavit filed by any of the staff of the PSFL to confirm that indeed they had been unable to carry on with their day to day operations as a result of the PSFL having been despoiled of its property; neither has applicant furnished any proof of the instruction which she alleges, the second respondent gave to the first respondent referred to in the founding affidavit.

[43] In a nutshell, it has been argued and submitted on behalf of the applicant that the meeting of the 24th May 2012 was a lawful meeting having been requisitioned by the members of that association, who also formed a quorum because members who attended same (meeting) constituted 20% of the whole PSFL membership.

[44] It was argued further in this regard that the second respondent decided not to attend that meeting because he knew that the fraud convictions against him were going to be discussed.

[45] It is however noted that the basis upon which second respondent is said to have known about the agenda item regarding his fraud conviction and or about the meeting of that day has not been disclosed. This Court has already alluded to the none issuance of and service of notices upon members of the applicant to attend this meeting. The meaning of agenda item no. 5 in annexure "D" is very obscure and unclear. In any case, applicant has failed to say whether or not second respondent was served with a copy of this petition.

[46] It has been argued further on behalf of the applicant that the respondents have raised a fresh matter at the replying stage and that this court should not allow them to do so. The Court has been referred to the case of Commander of the **LDF v. Ramokuena and Another LAC 2005 – 2006**.

The fresh issue being the unlawfulness of the meeting of the 24th May, which was allegedly attended by members who had not yet paid up their subscriptions.

[47] It was also argued on behalf of the applicant that, the above-stated reason or omission is a minor constitutional breach on the part of the applicant; and which omission this Court has been asked to ignore.

With respect, any constitutional breach cannot be said to be minor, especially where that omission has resulted in prejudice on the part of the affected party as is the position in the instant application.

[48] Notably, there is no agenda item regarding the removal of the chairperson – second respondent from the post of chairperson the rest of the executive members. With respect, the submission made on behalf of the applicant to the effect that the court should ignore what is called a minor constitutional breach which the applicant has committed is untenable.

Applicant does not say why he says that is a minor breach. By which yard stick does it measure that breach for it to say it is a minor one? With respect, that breach alluded to above has affected the rights of the chairperson of the PSFL as well as of the other members of the committee who have themselves not allegedly been convicted of fraud. They too were entitled to notification of the said meeting so that they could be heard before any drastic prejudicial decision was taken against them.

[49] This brings me to deal with the issue raised on behalf of the applicant that it had no alternative remedy but to convene the meeting in question, and thereby oust the 2nd respondent and all of the PSFL executive committee members. Refer to applicant's paragraph 4.12.3 of the heads of argument.

With the greatest respect, and in the circumstances of this case, the applicant should have approached the Court to ask it to order or to compel the 2nd respondent to convene that extra ordinary meeting before it ousted him from office. Actions of unlawfulness within or between members of any association, voluntary or not should not and cannot be countanced nor tolerated. That is why as a principle of the law, resort should be sort before courts of law, whenever no other solution in the dispute between members can be found.

[50] For the foregoing reasons, the rule nisi dated the 20th July 2012 is discharged, and the application is dismissed with costs to the respondents who have opposed this application.

M. Mahase

Judge

For Applicant	-	Adv. Q. Letsika
For 1st and 2nd Respondents	-	Adv. M.E. Teele K.C
For Other Respondents	-	No appearance